VOLUME 13 PART 10 — Pages 157-188

THE AUSTRALIAN LAWYER

being the
Thirteenth Volume of The
Australian Conveyancer and Solicitors Journal

OCTOBER 1960

BUTTERWORTH & CO. (AUSTRALIA) LTD.
(Incorporated in England)
SYDNEY: 6-8 O'Connell Street
MELBOURNE: 430 Bourke Street :: 240 Queen Street, BRISBANE
Registered in Australia for transmission by post as a periodical.

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LIABILITY IN TORTS FOR SERVANTS LENT OUT

by

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The recent decision of ADAMS, J., in *Lindsay* v. *Union Steam Ship Co. of New Zealand Ltd.*,[1] has once more drawn attention to a situation which commonly arises from day to day in various spheres of employment, namely, where a servant or employee is directed by his master or employer[2] to perform services for another. In such cases it is important to determine whether the person lent out becomes the servant of the man whose immediate purposes he serves or whether he remains the servant of the man who lent him, for on this generally depends which of the two principals is liable for negligent or other tortious acts committed by the employee. He may become the servant of the new master in relation to some acts but not to others and as the question of liability arises because of some specific act done by him the important question for consideration is whether he was acting as the servant of his new superior in performing that particular act.[3] In a statement approved as concise and accurate by the Privy Council,[4] CROSS, J., in the Court of Queen's Bench of Quebec, said that where the control of the master in whose general service a man is, has been, for the time being, displaced by the power of control of another master, into whose temporary service the man has passed by being lent or sub-contracted, then it is the *patron momentané* and not the *patron habituel* who is responsible for the man's tortious acts.[5]

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[1] [1960] N.Z.L.R. 486.

[2] See *Federal Commissioner of Taxation* v. *J. Walter Thompson (Australia) Pty. Ltd.* (1944), 69 C.L.R. 227 at p. 229, where Latham, C.J., declared that he was unable to distinguish the relation of employer and employee from the relation of master and servant.

[3] See *Nicholas* v. *F. J. Sparks and Sons* (1943), 61 T.L.R. 311, per Scott, Luxmoore and Goddard, L.JJ.: "The power of control of the new superior must be present in connexion with the doing of the particular act which proves to be tortious and so gives the injured party a right of action."
See also *The American Restatement of the Law*, Vol. 1, Agency 501.

[4] *Bain* v. *Central Vermont Railway Co.* (1921), 2 A.C. 412, at pp. 414, 415.

[5] (1918), 28 Que. K.B. 45, at p. 48.

Justice of the rule

The rule casting liability on the temporary employer in appropriate cases is clearly one founded on good reason. The principle of the master's liability for the wrongful acts of his servant has been said to have arisen out of the frequently recurring financial impossibility of getting money satisfaction in damages out of the actual individual who committed the wrongful act. Accordingly, where the wrongdoer was the general servant of an employer who could pay and who was getting profit or other advantage through his servant and through the operation from which the wrongful act of the servant arose the maxim *respondeat superior* was an expression of natural justice.[6] However, where the general employer put the servant in the position of being under a duty to obey the particular commands of a third person, and the command of that person was the direct cause of the wrongful act, then obviously justice required that the person injured should be able to treat the person giving the dangerous command as the worker's "superior". This conception, which appears to have been established as a rule of law in the 19th century, has recently been described as "a very useful . . . and just device . . . to put liability on the shoulders of the one who should properly bear it".[7]

The old test

During the 19th century it was generally considered that the test to be applied, in order to determine whether liability had shifted to the temporary employer, was whether the person sought to be held liable as the master had the power of controlling the work.[8] The classic statement of the old rule is to be found in the words of BOWEN, L.J., in *Donovan* v. *Laing, Wharton and Down Construction Syndicate Ltd.*,[9] where his Lordship said that what had to be considered was in whose employment the man had been at the time the acts complained of were done in the sense that employer meant the person who had a right at the moment to control the doing of the acts. The Lord Justice pointed out that there were two ways in which a

[6] See *Soblusky* v. *Egan and Behrendorff*, [1960] A.L.R. 310, at p. 314, where Dixon, C.J., Kitto and Windeyer, JJ., delivering judgment, referred to "the cynical conclusion of the late Dr. Baty concerning the ethical justification for the master's liability for the wrongs committed by his servant, namely that the real reason is that the damages are taken from a deep pocket: *Vicarious Liability* (1916) by Dr. T. Baty at p. 152."

[7] Per Denning, L.J. (as he then was), *Denham* v. *Midland Employers' Mutual Assurance Ltd.*, [1955] 2 All E.R. 561, at p. 564.

[8] This test was laid down by Crompton, J., in *Sadler* v. *Henlock* (1855), 4 E. & B. 570, at p. 578; 119 E.R. 209, at p. 212.

[9] [1893] 1 Q.B. 629, at p. 634.

contractor could employ his men and machines. He might contract to do the work and the end being laid down the means of arriving at it may be left to him. On the other hand, he could contract in a different manner so that, not doing the work himself, he places his servant and plant under the control of another, in which case he does not retain control over the work. His Lordship distinguished the cases dealing with the carriage of passengers, such as *Quarman* v. *Burnett*,[10] where it had been held that the drivers were not the servants of the passengers, on the ground that if a person let out a carriage on hire to another then in no sense did he place the coachman under the hirer's control, except that the latter could indicate the destination to which he desired to be driven. Thus the coachman did not become the servant of the passenger, who could only complain to the owner of the carriage if the driver acted wrongly.

The present test

During the 20th century the "control" test enunciated by BOWEN, L.J., has been replaced by a new test which is based on the nature and degree of detailed supervision or right of supervision over the acts of the workman by the person alleged to be his master. In order to be liable, the temporary employer must have the right to dictate not only what the servant is to do but also how he is to do it. The master's right to direct the performance of the act in question has become the vital consideration; and the test is, who has the right at the relevant moment to control the manner of execution of the acts of the worker?[11]

In *Mersey Docks and Harbour Board* v. *Coggins & Griffith (Liverpool) Ltd.*,[12] which has been described as "the leading case" on the topic of temporary employment,[13] the test above mentioned was approved and applied unanimously by the House of Lords. In that case a Harbour Authority which had let a mobile crane to a firm of stevedores for loading a ship and provided a driver to work the crane was held liable for injury to an employee of the stevedores caused by the negligence of the crane-driver in working the crane, as the stevedores had no

[10] (1840), 6 M. & W. 499.

[11] The present test may have been foreshadowed by Lord Campbell, C.J., in *Sadler* v. *Henlock* (1855), 4 E. & B. 570, at p. 577; 119 E.R. 209, at p. 212, where his Lordship declared: "The defendant" (sought to be held liable as the negligent workman's employer) "might have said" (to the workman) "'fill up the hole in the road, but not as you are now doing it, lest, when a horse goes over the place, he may be injured'."

[12] [1947] A.C. 1; [1946] 2 All E.R. 345.

[13] Per Jenkins, L.J., in *O'Reilly* v. *Imperial Chemical Industries Ltd.*, [1955] 3 All E.R. 382, at p. 388.

control over how he worked it as distinct from telling him what he was to do with it. VISCOUNT SIMON declared[14] that whilst the stevedores had the immediate direction and control of the operations to be executed by the crane-driver yet they had no power to direct how he was to work the crane and to manipulate the controls. As the accident happened because of the negligent way in which the crane was being worked over which they had no power of control and direction it followed that the general employers and not the hirers must be liable for the negligence. In the *Mersey Docks Case,*[15] *Donovan* v. *Laing, Wharton, and Down Construction Syndicate Ltd.*[16] was distinguished on the special facts of the latter case, BOWEN, L.J.'s test therein being declared by the Law Lords to be acceptable only on the basis that the words "to control the doing of the act" used by him meant the control of the way in which the act was done. VISCOUNT SIMON pointed out[17] that the real ground of the decision in *Quarman* v. *Burnett*[18] was that the passengers in the carriage had no control over the way in which the horses were being handled though they had power to tell the coachman where and when he was to drive them. His Lordship also said that if the hirers intervened to direct the manner of driving and the driver *pro hac vice* complied with the directions which led to a third party being negligently damaged, then the hirers may be liable in their capacity as joint tort-feasors with (though not as masters of) the driver.[19]

Relevant factors

In order to determine whether there was a continuation of the general employment for purposes of tortious liability regard may be had to various matters of fact which the courts have held they will take into consideration, according to their presence or absence, in arriving at their decision. Thus the degree of skill requisite for the job is often of considerable significance as is the ownership of the instrumentalities and tools used in the work. It has been said that where a man driving a mechanical device such as a crane is dispatched to perform a particular task, it is easier than otherwise to infer that the general employer continues to control the method of performance because it is his crane and the driver remains responsible to him

[14] [1947] A.C. 1 at p. 10; [1946] 2 All E.R. 345.
[15] [1947] A.C. 1; [1946] 2 All E.R. 345.
[16] [1893] 1 Q.B. 629.
[17] [1947] A.C. 1 at p. 11; [1946] 2 All E.R. 345.
[18] (1840), 6 M. & W. 499.
[19] [1947] A.C. 1 at p. 12; [1946] 2 All E.R. 345.

for its safe-keeping.[20] In *Denham* v. *Midland Employers' Mutual Assurance Ltd.*, DENNING, L.J., expressed the view that where a trained driver is lent with a machine such as a crane or a lorry, or when a skilled man is hired out so as to exercise his skill for the temporary employer, then it is difficult to draw the inference that the parties had contemplated that the temporary employer should tell the man how to manipulate his machine or exercise his skill. In such a case the workman himself in effect usually determines the manner in which he carries out his task. On the other hand, when an unskilled man is lent to help with the labouring work the temporary employer can then no doubt tell the labourer how he is to do his job.[21] The fact that the general employer is in the business of hiring out machines and men is relevant for in such a case there is more likely to exist an intent to retain control than where a person not in such business and as a matter not within his general business enterprise permits his servant and instrumentality to assist another.[22]

The control by the hirer of the premises where the work is done is also a significant factor. It has been held that where the employees lent are to work in a factory owned by the hirer, who provides the necessary tools and equipment and advises them as to the system of working, then the responsibility for providing safe plant and equipment is not to be easily placed on the regular employer, who would have no control over the employees in such a case.[23] Again, the inclusion of the men in the hirer's own employers' liability policy has been said to indicate that he should be held liable as their master, especially when they are not the subject of a similar policy taken out by their regular employer.[24] Further, the length of the period of work for the temporary employer and the method of payment—whether by the time or by the job—may also bear on the decision.[25]

[20] [1947] A.C. 1 at p. 17 per Lord Porter. See also, *Dowd* v. *Boase*, [1945] 1 All E.R. 605, per Morton, L.J., at p. 608: "The burden of proof lying upon the regular employers is particularly difficult to discharge in cases where the workman who caused the accident was driving a vehicle belonging to them, of which he was in sole charge, and which he alone was allowed to drive on the day of the accident. In such a case the vehicle has been placed under the control of the driver by his regular employers, who rely upon him to use his own skill and exercise his own discretion in driving it. This being so, if he causes an accident by negligent driving, it is not easy to establish that someone else was his superior at the time of the accident."

[21] [1955] 2 All E.R. 561, at p. 564.

[22] Cf. *The American Restatement of the Law*, Vol. 1, Agency 502.

[23] *Garrard* v. *Southey & Co.*, [1952] 1 All E.R. 597.

[24] *Gibb* v. *United Steel Companies, Ltd.*, [1957] 2 All E.R. 110, at p. 115.

[25] Cf. *The American Restatement of the Law*, Vol. 1, Agency 488.

The importance of the agreement

Another matter to be considered when dealing with cases of temporary employment is the effect of the agreement made between the two employers on the question of liability. As regards any declaration in the agreement stating that the workman shall be the servant of the hirer or the regular employer as the case may be, it is clear that if the relationship thus proclaimed does not in fact exist then it has no effect on the rights of the employee or any person injured by his negligence. It is merely an incorrect inference of law and the general rule applies that the parties to a contract cannot alter their true legal relationship by a contractual provision which is not in accord with the facts of their case.

However, as was pointed out recently by ADAMS, J., in *Lindsay* v. *Union Steam Ship Co. of New Zealand Ltd.*,[26] those terms of the agreement which set out the rights of the hirer or the permanent employer with respect to the dominion and control exercisable over the workman stand on a very different footing. So long as they are not contradicted by the concrete facts of the case, provisions of this kind may have a considerable influence on the decision of the court and, as ADAMS, J., has shown,[27] such an approach can be reconciled with the judgments in the *Mersey Docks Case*,[28] which can be construed so as to offer no objection to it. Though the Law Lords in that case repeatedly emphasized that an agreement between the general employer and the hirer is not of itself conclusive evidence of the facts therein stated, yet their Lordships did not go so far as to suggest that the terms of the agreement should necessarily be inadmissible or be disregarded. It must be remembered that in the *Mersey Docks Case*[29] the Members of the House were primarily concerned with the regulation of the Harbour Board incorporated in the agreement between the Board and the stevedores that the drivers provided were to be the servants of the hirers. This was clearly a contractual provision of the kind first referred to which sought to determine a legal relationship by attaching a label to it in the agreement, which was incorrect and which could have no effect on the true legal position.

Thus it may well be that the above-mentioned judgment of ADAMS, J., indicates a trend towards ascribing greater significance to the terms of the contract and those provisions which define the rights exercisable over the

[26] [1960] N.Z.L.R. 486 at pp. 494-496.

[27] [1960] N.Z.L.R. 486 at pp. 494-496.

[28] [1947] A.C. 1; [1946] 2 All E.R. 345.

[29] [1947] A.C. 1; [1946] 2 All E.R. 345.

employee may now have even a decisive influence on the ultimate decision. Accordingly, it seems more important than ever to pay attention to the question of liability in torts when drawing up the agreement and to make full provision as far as possible for the event of this question arising in a court of law. If the parties intend that the hirer should be liable for the workmen lent out, then the agreement should confer on him all such rights over the men as would show that he has the right to direct them both as to what has to be done and the manner in which the task is to be performed. In this connexion regard may be had to various *indicia* of control which have been regarded as significant by the courts over the years. Thus the hirer's right to dismiss the workmen, to lay down the system of working and make the temporary employees conform to the working hours, practices and routine of the regular employees, to supervise their work generally and make them repeat it if not satisfied, as well as the vesting in the hirer of the function of paying the workmen's wages, have all been treated as indicating the necessary transfer of employment.[30] Similarly, if it is intended that liability should be retained by the general employer the contract should be drafted accordingly. It must always be remembered, however, that such an agreement loses its utility if it is not in fact followed by the parties, for the courts will not hesitate to look behind it and arrive at their decision according to the true facts of the case.[31]

The burden of proof

It is important to remember that, as VISCOUNT SIMON pointed out in the *Mersey Docks Case*,[32] the burden of proof lies on the regular employer to show affirmatively that his negligent employee was not acting within his proper discretion as his servant but that pursuant to an arrangement between the general employer and the other party the employee was required to govern his conduct by following the guidance and instructions of the other party. The regular employer cannot escape liability on a negative but must give positive proof that such responsibility has been assumed by the other party.[33]

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[30] See *Garrard* v. *Southey & Co.*, [1952] 1 All E.R. 597, and *Denham* v. *Midland Employers' Mutual Assurance Ltd.*, [1955] 2 All E.R. 561.

[31] *Lindsay* v. *Union Steam Ship Co. of New Zealand Ltd.*, [1960] N.Z.L.R. 486 at p. 494.

[32] [1947] A.C. 1, at p. 10; [1946] 2 All E.R. 345.

[33] Cf. *Nicholas* v. *F. J. Sparkes and Sons* (1943), 61 T.L.R. 311.

The burden that has to be discharged is a heavy one and this rule applies even though the person seeking to set up the shift of responsibility to the temporary employer is not the general employer but the workman himself. Though in the *Mersey Docks Case*[34] the party seeking to set up the transfer of the right of control and direction was the Harbour Board—the permanent employer—and the heavy burden there referred to was that resting on the permanent employer, it has since been held that the same burden rests on the employee should he choose to sue not his general employer but the person who, he claims, temporarily owed him as servant the duty of master.[35] Thus the same heavy onus rests on whoever attempts to establish that liability for the particular act, which was the cause of the injury in question, lies on the temporary employer who for the time being has the advantage of the service rendered.

Present trend against inference of transfer

In the past twenty years the courts have shown an increasingly marked reluctance to vest liability in the temporary employer. In *Century Insurance Co.* v. *Northern Ireland Road Transport Board,* LORD WRIGHT expressed the view that most cases of temporary employment can be explained on the basis that there is an understanding whereby the worker is to obey the directions of the person with whom the employer has entered into a contract so far as it is necessary or convenient for the purpose of performing the contract. In such a case the directions are received by the employee not as the servant of the other person but as the servant of his regular employer.[36] Five years later in the *Mersey Docks Case,* VISCOUNT SIMON declared that the burden on the general employer could only be discharged in quite exceptional circumstances.[37] Still more recently, in *O'Reilly* v. *Imperial Chemical Industries Ltd.,* JENKINS, L.J., stated that the range of cases in which liability is held to have shifted to the temporary employer or, as has been said, the relation of employer and employee *pro hac vice* is found to exist, ought not to be extended.[38]

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[34] [1947] A.C. 1; [1946] 2 All E.R. 345.

[35] *O'Reilly* v. *Imperial Chemical Industries Ltd.,* [1955] 3 All E.R. 382.

[36] [1942] A.C. 509, at p. 517; [1942] 1 All E.R. 491.

[37] [1947] A.C. 1 at p. 10; [1946] 2 All E.R. 345.

[38] [1955] 3 All E.R. 382 at p. 388.

Thus, as was observed in the recent New Zealand decision previously referred to,[39] the tenor of modern English authorities is now opposed to the division of control between two masters unless it can be said that the servant in some real sense alternates from being employed by the one and becomes temporarily employed by the other.[40] However, within these limitations the case of employment *pro hac vice* will and has been still found to exist where appropriate circumstances are present. In none of the cases above mentioned did the judges deny that the necessary transference of control and supervision could take place if the required conditions were fulfilled. Indeed, in the *Mersey Docks Case*, LORD MACMILLAN expressly stated that it is always open to an employer to show that for a particular purpose or occasion he has temporarily transferred the services of one of his servants to another so as to constitute the servant *pro hac vice* the servant of the other with consequent liability for his negligent acts.[41] Where it is established that the temporary employer has the right to control the manner in which the workman does his task, so that he is able to tell him the right way or the wrong way to do it, then he is liable for the man's acts, for it is clearly just that he should be responsible when they are done in the wrong way as well as when they are done in the right way.[42]

The effect of changing conditions in society

In applying the rule as to liability for servants lent out, the courts have not hesitated to adapt it to the changing social, economic and industrial conditions of the society in which it operates;[43] this is shown by the realistic attitude taken by the courts with regard to the question of supervision and control over the work of the employee. The increase of specialization in modern times has led, in many spheres of work, to a loosening of the supervision actually exercised over the worker in the performance of the work he is detailed to do.[44] The courts have met this situation by declaring that it is the vesting in the hirer of the authority to control the doing of the work that is material and given the existence of the authority its exercise or non-exercise at the time of the act in question

[39] *Lindsay* v. *Union Steam Ship Co. of New Zealand Ltd.*, [1960] N.Z.L.R. 486.

[40] [1960] N.Z.L.R. 486 at p. 493.

[41] [1947] A.C. 1 at p. 13; [1946] 2 All E.R. 345.

[42] Cf. *Denham* v. *Midland Employers' Mutual Assurance Ltd.*, [1955] 2 All E.R. 561, at p. 564.

[43] Cf. J. Stone, *The Province and Function of Law* (1946), pp. 166-206.

[44] Cf. Sir J. Salmond, *Law of Torts* (12th ed., 1957), at p. 107.

is irrelevant. As LORD PORTER pointed out in the *Mersey Docks Case*, it was true that in most cases no orders are issued or required as to how the work should be done but the ultimate question is not whether any or what specific orders were given but who is the person entitled to direct how the work should be carried out.[45]

The desire of the judges to see that the rule conforms to changing conditions in society may also explain their reluctance in present times to cast liability on the temporary employer. Support for this view is to be found in the words of LORD PORTER in the *Mersey Docks Case*.[46] There, his Lordship said that the need for a careful consideration of the circumstances said to produce a change of employment has lately been accentuated by provisions in statutes now in force for compulsory health and accident insurance, as well as by the practice of many firms to accumulate funds in trust for the benefit of their employees; with the result that the latter will not now lightly incur the risk of being deprived of such benefits by the transfer of their services to another master.

Employment pro hac vice and the organization test

It must be observed that while ready and willing to develop the rule within its wide ambit, the courts have not gone so far as to discard the test of supervision and control over the performance of the work for a test based on whether the worker was a part of his alleged employer's organization subject to co-ordinational control as to the time and place rather than the manner of execution of his work. Professor Fleming has suggested that the "organization" test is replacing the traditional "control" test as the proper test to be applied for distinguishing a servant from an independent contractor.[47] However, in the field of liability for employees *pro hac vice*, the test of supervision and control over the manner of performance of the task, as affirmed by the Law Lords in the *Mersey Docks Case*,[48] still seems firmly established as the test to be applied, though the words of DENNING, L.J., in *Denham* v. *Midland Employers' Mutual Assurance Ltd.*[49] do indicate that the organization aspect may become significant here, too, as one of the relevant factors to be considered by the courts in arriving at their decisions.

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[45] [1947] A.C. 1 at p. 17; [1946] 2 All E.R. 345.

[46] [1947] A.C. 1 at p. 15; [1946] 2 All E.R. 345.

[47] J. G. Fleming, *The Law of Torts* (1957), at p. 360.

[48] [1947] A.C. 1; [1946] 2 All E.R. 345.

[49] [1955] 2 All E.R. 561, at p. 564.

Conclusion

Thus, summing up, where a man is lent or hired out to a temporary employer by his regular master, the former is liable for the man's tortious acts provided that the temporary employer has the power to control the manner of execution of the acts in question. The rule is a just one, for it is generally the manner in which a particular operation is performed (assuming it to be in itself a lawful operation) that determines its wrongful or lawful character. The burden of proving the vesting of the required power of control in the hirer is a heavy one and lies on the person seeking to set up the transfer of liability from the regular employer to the hirer, whether that person be the general employer or the workman himself.

In coming to its decision the court will take into account a number of matters which are regarded as relevant factors and will give effect to them insofar as they represent the true state of affairs in the eyes of the court. In particular, the terms of the contract setting out the rights of direction and control exercisable over the workman may be treated as significant so long as they are in fact followed and observed by the parties. In recent times the courts have been unwilling in most cases to place liability on the temporary employer and will not now do so unless the rigorous test is fully satisfied. This judicial attitude may be due to the influence on the courts of changing conditions in society which have affected the rule as to liability for temporary employees in a number of ways. On the whole, the rule appears to have been regarded as sufficiently flexible to allow it to be kept abreast of new developments and changing conditions; and the wide freedom of choice[50] given to the courts through their power to draw inferences of fact from the surrounding circumstances and to do so according to what appears to them to be the realities of the case has enabled them to arrive at decisions which are just and reasonable on the facts of each particular case.

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[50] Cf. *McDonald* v. *Commonwealth* (1945), 46 S.R. (N.S.W.) 129 at p. 132, per Jordan, C.J.: "From certain facts, if accepted as proved, it would follow as a matter of law that the liability remained with the general employers. From others, that it had shifted to the particular employer. Between the two extremes there is a wide field in which a finding of liability on the part of either by a tribunal of fact would not be disturbed."

Australian Conveyancer and Solicitors Journal, October, 1960.

THE INDUSTRIAL ARBITRATION (AMENDMENT) ACT 1959

by

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PART II

Independent contractors and employees (the vendor system)

The contract system, i.e., the contract for services as opposed to the contract of service, has always raised problems in relation to industrial legislation. In some cases, a relationship of employer and independent contractor was created simply to evade the obligations imposed by the Industrial Aribitration Act, the Workers' Compensation Act, the Long Service Leave Act and other industrial legislation. In many cases, however, the creation of this relationship represented a genuine attempt on the part of the contractor, at least, to become a "small businessman" instead of being an employee. Whatever the motives, the contract system lent itself to many abuses. Before 1957, the arbitration tribunals, in ascertaining whether the alleged contractor was, in law, an employee, had to rely on the statutory definitions of "employee" (or its equivalent) in the various Acts or on the common law meaning of master and servant. But these were, from a social standpoint, inadequate weapons and the spread of the contract system in various trades threatened to deprive many small contractors of their benefits not only under awards, but also under such legislation as the Annual Holidays Act and the Long Service Leave Act. To meet this problem the Industrial Arbitration Act was amended in 1957[57] to provide that certain contracts, e.g., in relation to bread delivery, milk vending, would be void and the parties to it would be penalized unless the contract was first approved by the Commission. Approval depended, essentially, on the contract providing benefits more favourable than an employee working in the same occupation would be entitled to receive. Apparently, however, these provisions still proved inadequate[58] and further additions and amendments were made by the 1959 Act. The new provisions are too complex to discuss in detail here. In broad outline, however, the new Act removes milk vending, taxi cab and goods delivery contracts from the scope of the 1957 Act. At the same time, it classes these types of contractors as well as a number of others as "employees"

[57] Act No. 23 of 1957.

[58] Parliamentary Debates 2351-2 (Mr. Maloney).

within the meaning of the Industrial Arbitration, Annual Holidays and Long Service Leave Acts, thus entitling them to the benefits under that legislation. The new Act goes even further and empowers the Commission to avoid contracts which appear to it to be unfair, harsh or unconscionable, against the public interest, designed to avoid the provisions of an award or industrial agreement or which provide sub-award rates.[59] These provisions, coupled with the 1957 amendments, seriously qualify the common law concept of contract. But, it is submitted, they should not be approached from that standpoint. The Industrial Arbitration Act and its companion Acts are social legislation designed to protect persons even against themselves. If this premiss is accepted, there seems no real impediment to agreeing with their policy of limiting freedom of contract in this sphere.

Obsolete provisions

The legislators took this opportunity of removing from the Act three areas which have long fallen into disuse, viz., Part IV (Prices of Commodities),[60] Part XIV (State Labour Exchanges)[61] and Part XV (Insurance Against Unemployment).[62]

Trade Unions

Although there was some criticism of the three main topics (just discussed) they raised no serious opposition. Otherwise, however, in relation to trade unions and strikes which appeared to be anathema to the Opposition.

The amendments concerning trade unions covered several important matters and involved changes not only in the Industrial Arbitration Act but also in the Trade Union Act. Before outlining these changes, however, it may be well to say a few words about the position of trade unions in New South Wales. The original (and perhaps basic) New South Wales legislation dealing with trade unions is the *Trade Union Act* 1881-1959 which, apart from the 1959 amendments, is virtually copied from the English Acts of 1871 and 1876. As such, it legalizes trade unions and their agreements at criminal and civil law, and prevents certain agreements from being directly enforceable in any court of law. These provisions apply to all trade unions, whether registered or not under the Trade Union

[59] Section 8 (1959 Act) amending s. 88B and inserting ss. 88E and 88F (Principal Act). Various safeguards are provided but space does not permit their discussion here.

[60] Sections 39-52 (Principal Act) deleted by s. 6 (1959 Act).

[61] Sections 132-5 (Principal Act) deleted by s. 13 (1959 Act).

[62] Section 154 (Principal Act) deleted by s. 14 (1959 Act).

Act. It also permits trade unions—if they so desire—to register under that Act, whereupon they receive some additional powers in relation to the holding of property and the like.[63] But the Industrial Arbitration Act also contains a number of provisions dealing with trade unions, *as such*.[64] However, "trade union" is defined by s. 5 of that Act as "a trade union registered under the Trade Union Act", which means that unregistered trade unions do not come within the relevant provisions of the Industrial Arbitration Act. However, the bodies with access to the arbitration authorities and in respect of whom awards are made are necessarily in the case of employees, "industrial unions". Industrial unions of employees must go through a double process of registration, i.e., they must first register as a trade union under the Trade Union Act and then register as an industrial union under the Industrial Arbitration Act.[65] This is not necessary in the case of industrial unions of employers. It will be seen, therefore, that the provisions of the Industrial Arbitration Act dealing with trade unions (ss. 107-117) automatically apply to all industrial unions of employees.

The main changes effected by the 1959 Act deal with five main matters, viz., (1) unions and collective bargaining, (2) restrictions on trade unions competing with industrial unions, (3) political levies, (4) right of entry, and (5) preference to unionists.

(1) UNIONS AND COLLECTIVE BARGAINING

As matters stood before the 1959 Act, it was difficult for a union to "back out" of the arbitration system and indulge in collective bargaining. This was so because, although an industrial union could apply to have its registration cancelled, it had first to satisfy the Commission that a majority of its members had, by secret ballot, agreed to such cancellation. More important, however, was the fact that its registration could not be cancelled while there was *any* award or industrial agreement applying to its members.[66] The new s. 9[67] is designed to overcome this. The union applies for de-registration in the manner

[63] See generally: Portus, *The Development of Australian Trade Union Law* (1958), Melbourne University Press, Ch. II.

[64] Sections 107-117 (Principal Act).

[65] See s. 5 (definition of trade union) and s. 8 (Principal Act).

[66] Section 9 (1940-1958 Act). Note, however, s. 99 of that Act (which enables an industrial union of employees to render an award which has been in operation for at least 12 months no longer binding by vote of a majority of its members at a secret ballot in which not less than two-thirds of the members participated).

[67] Inserted by s. 3(d) (1959 Act).

prescribed[68] to the Registrar who, on being satisfied that the requirements have been met, issues a certificate of withdrawal. On the expiration of twenty-eight days from the issue of this certificate the union's registration is automatically cancelled. By the same provision the Commission is empowered to cancel any award or industrial agreement relating to such de-registered union, but not so as to free it from obligations incurred prior to de-registration. The Minister for Labour and Industry (Mr. Maloney) expressed regret that unions should wish to leave the arbitration system[69] but some of the Opposition members were more vocal in their criticism, suggesting the new measure was a retrograde move.[70] There has, from time to time, and particularly of recent years, been some pressure to move outside the arbitration system and indulge in collective bargaining. This new provision will, at least, test the "bona fides" of those who claim that collective bargaining is the panacea for their industrial ills. More specifically, however, the new s. 9 raises some other interesting issues. In the first place, could such a de-registered union enforce its collective agreements in an ordinary court of law? The opinion generally held is that it could not.[71] But there remains s. 111 of the Industrial Arbitration Act which states:

> "The Commission may entertain and adjudicate upon any legal proceedings instituted for the purpose of directly enforcing or recovering damages for a breach of any of the following agreements:
>
> (c) any agreement for the regulation of any business or industry as between employers and employees made by a trade union with an employer or employers;
>
> (d) any agreement made between one trade union and another.
>
> Provided that such agreements shall be in writing, and that copies of them, verified as prescribed, shall have been filed with the Commission."

This provision should be read in conjunction with s. 112 which provides that "for the purpose of exercising the jurisdiction conferred on it by this Part of [the] Act (ss. 107-117) the Commission shall have all the powers of the Supreme Court...".

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[68] See: Industrial Arbitration Act Regulations—Reg. 19B.

[69] Parliamentary Debates, 2364.

[70] See: Parliamentary Debates, 2402 (Mr. Sommerlad).

[71] See: Portus, *The Development of Australian Trade Union Law* (1958), Melbourne University Press, pp. 79-84.

It is arguable that s. 111 (c) or (d) could be invoked to enforce collective agreements provided copies of those agreements had been filed with the Commission, for the de-registered industrial union would, as such, remain a registered trade union. In such a case the Commission could presumably award damages and possibly issue an injunction against further breaches of the agreement. Whether the Commission would regard a collective agreement as falling within the scope of the agreements enumerated in s. 111 (c) and (d) is another matter, if only on the grounds that collective agreements are not intended to create binding legal relations. Moreover, there is the further problem of what normative effect such an agreement would have, even if enforced, on individual contracts of employment made pursuant to it. One thing is quite clear; s. 111 was never envisaged as a means of enforcing collective agreements made outside the arbitration system. The relatively few cases which have dealt with this provision[72] have been concerned with intra-union disputes and, quite naturally, have never adverted to the matter under discussion. Still it will be interesting to see whether any attempt is made to use s. 111 for that purpose.

Before leaving the amended s. 9, passing reference may be made (rhetorically) to two other matters. What will be the attitude of the Registrar (and of the Commission on appeal) should a union de-registered under s. 9 apply for re-registration, particularly if another union has been registered in its place? And, why was the new s. 9 not extended to cover industrial unions of employers?

(2) RESTRICTION ON TRADE UNIONS COMPETING WITH INDUSTRIAL UNIONS

There was, in the 1940-1958 Act, a rather unusual provision (s. 12), which enabled a registered trade union of employees (not registered as an industrial union) to enter into an agreement concerning "industrial matters" which, when registered, was enforceable under the Act. This provision was little used and apparently worried no one. Recently, however, a body of New Australians, called the New Citizens' Council, obtained registration as a trade union. This apparently aroused the wrath of the trade union movement[73] who could not accept the idea of trade unions competing with industrial unions. To prevent a

[72] See: *Webster* v. *Breadcarters' Union of N.S.W.* 1927 A.R. 67; *Tinning* v. *Simpson* 1941 A.R. 41; 1942 A.R. 384; *Dawson* v. *Bond* 81 I.G. 164; *Transport Workers' Union of Australia* v. *Knoblanche* 1954 A.R. 301; *Cagney* v. *Australian Coal, Etc., Employees' Federation* 1955 A.R. 938.

[73] Parliamentary Debates, 2125 (Mr. Landa), 2416-7 (Mr. Kenny).

recurrence of this problem two steps were necessary. First, the Trade Union Act had to be amended. Prior to this amendment, the Registrar of Trade Unions had no discretion when registering an applicant body. Provided the applicant had complied with the limited requirements prescribed by s. 14 and the First Schedule of that Act, it must be registered. Under the amending legislation the Registrar may now refuse to register an applicant body where he considers that it is "not a bona fide trade union of employees" or "that the persons entitled to become and remain members of the trade union may conveniently belong to an industrial union of employees".[74] This provision virtually adopts the wording of s. 8 (3) of the Industrial Arbitration Act and presumably will be interpreted in accordance with the decisions on the latter section. But the matter does not stop there. Section 15 of the Trade Union Act was enlarged to provide that a union's registration can be cancelled "on proof to [the Registrar's] satisfaction that a certificate of registration would not have been obtained had [s. 14 (7) *supra*] been in force at the time when the application for such registration had been made".[75] This amendment is, of course, directed at *existing* registered trade unions. It seems, that to fall within this provision, it must be shown that at the time when the trade union was registered it was not a "bona fide" trade union or that there was an industrial union in existence which could have covered satisfactorily the industrial interests of the trade union members. Subsequent registration of such an industrial union would apparently not jeopardize its registration. But what if it were shown that although the trade union was not "bona fide" when registered it had subsequently become so? As a safeguard against unwise action by the Registrar, it is further provided that an appeal shall lie from his decisions under these new provisions to the Commission in "court session".[76] The second step to overcome the problems, discussed above, was to repeal s. 12 of the Industrial Arbitration Act, which was accordingly done.[77]

This action by the Government raises some awkward questions which, again, can be stated in rhetorical form. Firstly, should a body which has fulfilled all the legal requirements at the time when it was registered be deprived of that registration, with its associated privileges, because new conditions for registration are not only

[74] Section 14(7)(a), (b) Trade Union Act as amended by s. 15 (1959 Act).

[75] Section 15(3) Trade Union Act inserted by s. 15 (1959 Act).

[76] Section 15A, Trade Union Act inserted by s. 15 (1959 Act).

[77] Section 3(f) (1959 Act).

imposed but also applied retrospectively to the date of registration? Secondly, did not the provisions of s. 12 permit and encourage a form of collective bargaining (within the arbitration system), a type of industrial activity which the Government recognized by its amendment of s. 9? It would, indeed, be ironical, if s. 111 were construed to enable trade unions to make enforceable collective agreements.[78]

(3) Political Levies

Section 107 (1) (c) and (2) of the Industrial Arbitration Act (which, prior to 1959, followed the general pattern of the English *Trade Union Act* 1913), empowers registered trade unions to use and apply their money and other property for the furtherance of political objects.[79] Before the recent amending Act the following conditions were required to be observed, however. The union must have rules in force providing (1) that payments in furtherance of political objects (as defined in s. 107 (2)) were to be made out of a separate fund, (2) that contribution to that fund was not to be a condition of admission to union membership, and (3) that a member who did not contribute to the political fund was not to be excluded from any benefits of the union or placed under any disability or disadvantage as compared with other members by reason of his failure to contribute. The Act further provided that the separate political fund was not to be attached for the enforcement of any penalty against the union.[80]

Many New South Wales unions have, for a long time, imposed political levies for the benefit of the Australian Labour Party. But it is also true that in a number of cases the provisions of s. 107 were not strictly observed. Recently the matter of "political levies" received considerable publicity in two cases, the *Hursey Case*[81] and *Wheatley* v. *Federated Ironworkers' Association of Australia*.[82] Although (on both the facts and the law) the political levies in question were upheld, these decisions emphasized the limitations of s. 107 which, apparently, the trade union movement and the Labour Party found irksome.

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[78] See pp. 171, 172 *supra*.

[79] That Act was passed to overcome the effect of *Osborne* v. *Amalgamated Society of Railway Servants*, [1910] A.C. 87. See also: Portus, *The Development of Australian Trade Union Law* (1958), Melbourne University Press, pp. 66-8, 237 *et seq.*

[80] Section 110 (Principal Act).

[81] *Williams* v. *Hursey*, [1959] A.L.R. 1383.

[82] (1959) 14 I.I.B. 509.

The effect of the 1959 amendments is to remove most of the earlier limitations. Under the new provision, a registered trade union is empowered to provide in its rules —it must do this—"for the application of its money and property to the furtherance of political objects".[83] It is no longer necessary for the union to have a separate political fund or to (legally) safeguard non-contributors against discrimination by, say, the union executive. But, as already indicated, these so-called safeguards were by no means rigorously applied and, in any case, they were not very effective against the organized views of a militant majority. Their removal from the Act could, perhaps, be justified on grounds of realism or expediency. However, the 1959 Act did not create, *de novo*, the power to contribute funds for political purposes; it simply removed certain restrictions imposed on the unions in the exercise of an existing power. Quite apart from those restrictions, the rights and privileges of members and the powers of unions, in this connexion, were subject to some measure of control by means of various other provisions in the Industrial Arbitration Act, notably s. 8 (registration of industrial unions), ss. 107 (1) (b), 109, 111 (enforcement of union rules and agreements), s. 115 (entitlement to membership and membership disputes), and Reg. 17 (alteration of union rules). The 1959 amendments did not change these provisions and, although their scope has, in certain respects, been affected by the removal of the restrictive clauses in s. 107 (1) (c) (*supra*), they still remain in the Principal Act. Irregularities in the application of political funds and union rules discriminating against non-contributors are still matters which might invoke the operation of these provisions. In addition, a union member might, in certain circumstances, be able to seek relief in the ordinary courts by way, for instance, of a declaration or an injunction. In short, therefore, the 1959 Act has not removed *all* the safeguards in relation to political contributions.

The amending legislation did, however, impose one new limitation; a trade union may not further the political objects of an organization "unless [it] is entitled to be affiliated with that organization".[84] The object of this rather curious provision is, apparently, to prevent contributions to the Communist Party for, *semble*, the rules of that organization prohibit affiliation with any other body.[85] It would appear that the other main political parties do not have this self-denying ordinance.

[83] See s. 11(a) (1959 Act).

[84] Section 107(4) (Principal Act) inserted by s. 11(a) (1959 Act).

[85] Parliamentary Debates 2357 (Mr. Maloney), 2410-11 (Mr. Wilson).

The issues which provisions like s. 107 (1) (c) (*supra*) raise are essentially moral, social and political and they should be judged on that basis. The law here is very much the handmaiden of the politician.

(4) RIGHT OF ENTRY BY UNION OFFICIALS

The amending Act also widens the right of entry powers available to union officials. There are some 29,000 factories and 50,000 shops in New South Wales which are subject, in one way or another, to State industrial laws and awards. The task of policing the industrial conditions in all these establishments is obviously beyond the capacity of the limited numbers of Industrial Inspectors available. This is the *raison d'etre* of the union officials' right of entry —to detect non-observance and to deter potential wrongdoers. On the other hand, every extension of such power marks an intrusion into the employers' "sphere of management", i.e., the "right" to conduct his business as he thinks fit, and, in particular, to exclude strangers from his premises. As might be expected, the right of entry power, in Australia, is in the nature of a compromise—the union official is given the right to enter the employers' premises but only subject to certain conditions. The 1959 Act, in effect, widens the power by removing some of the conditions.

The union officials' right of entry is governed by s. 129A of the Principal Act.[86] Prior to 1959, this provision empowered the Registrar to grant entry and inspection permits to secretaries or duly accredited representatives of industrial unions of employees. Such a permit enabled the grantee to enter the employer's business premises during working hours, to investigate suspected breaches of awards and agreements,[87] and, during non-working hours,[88] to interview employees on legitimate union business. The permit also gave him the right to inspect time and pay sheets, but only where award breaches were suspected. It remained in force while the grantee was the secretary or duly accredited union representative and could be revoked by the Industrial Registrar "if he [were] satisfied that the person to whom it was issued [had] wilfully

[86] *Note*: (1) This provision was inserted in 1951, (2) the source of the power is s. 5 ("industrial matters"); see: *Re Sugar Manufacturers (State) Conciliation Committee* 1926 A.R. 113; (3) jurisdiction to provide for "right of entry" has existed since the original Act of 1901; (4) wide powers of entry and inspection are conferred on members of the various industrial tribunals by s. 129.

[87] There must have been a bona fide suspicion that the award, etc., had been breached *Re Storemen & Packers, Etc. (State) Award* 1951 A.R. 527.

[88] E.g., lunch time or tea breaks.

hampered or hindered employees during their working time or [had] otherwise acted in an improper manner . . ."[89] At the same time, obstruction of such a right of entry was penalized by a maximum fine of £50.

This provision, however, had certain shortcomings in the eyes of the unions. It was limited to entry upon premises belonging to an employer in the relevant industry and did not extend, for instance, to premises occupied by other parties.[90] According to the Government sponsors of the Bill, the unions also complained that occasionally they had difficulty in gaining entry to an employer's premises.[91] They now sought the return of the type of ["right of entry"] clause which operated between 1927 and 1943.[92] Their wishes were acceded to in the Amending Act which repealed the existing s. 129A and substituted a new provision.[93] Two significant changes were made. In the first place the right to interview employees was no longer restricted to non-working hours. Secondly, although the new s. 129A still prohibits union officials from wilfully hampering employees during their working time, the sanction of having their permit cancelled has now been removed from the Act. These changes, however, are not likely to affect greatly the general question of right of entry, for this is governed basically by the policy of management and the attitude and personality of the union officials concerned.

[*Continued on p. 182*]

[89] Section 129A(3)(c) (1940-1958 Act).

[90] *Carter* v. *Reid* 1954 A.R. 437.

[91] Parliamentary Debates 2404 (Mr. Sommerlad), 2419 (Mr. Weir).

[92] For a survey of this type of clause and an analysis of the effect of the 1943 amendments see *Re Engineers, Etc. (State) Award* 1944 A.R. 431.

[93] Section 12 (1959 Act).

PUBLISHERS' JUBILEE

Fifty years ago, Butterworth & Co. (Australia) Limited opened their first office in the Australian Continent, on 2 September 1910. Butterworth law books had, in fact, been in use throughout Australia since the beginning of the practice of law in this country. The House of Butterworths dates from 1818, and its origin can be traced back to Richard Tothill, a sixteenth century bookseller of Bell Yard, Fleet Street, London.

The premises of the first Australian Branch Office of Butterworth in Sydney were in Elizabeth Street, which later became part of the present University Chambers. The next move was to 180 Phillip Street, where Wentworth Chambers now stands as a monument to the Bar of New South Wales. A later move was to King Street, in a building known as Halsbury House. In need of more room for expansion, the Sydney Office was in 1929 moved to the present address at 6-8 O'Connell Street. In the meantime, other Offices have been opened in Wellington, New Zealand (1914); Melbourne, Victoria (1925); Auckland, New Zealand (1930) and Brisbane, Queensland (1947).

Direct contact with the Profession, not only made available the well-known Butterworth textbooks, but their larger works, of which HALSBURY'S LAWS OF ENGLAND, First, Second and Third Editions, has an unequalled place. The last two Editions have their own Australian PILOTS. There was also the ENGLISH AND EMPIRE DIGEST (of cases); (Lord) ATKIN'S COURT FORMS and the ENGLISH ENCYCLOPAEDIA OF FORMS AND PRECEDENTS.

These, however, formed only the foundation of Butterworths' contribution to the service of the legal profession in Australia. In 1914, they took over the then Federal LAW LIST, which was only two years old, redesigned it, and again redesigned it a few years ago, to produce the well-known LAW LIST OF AUSTRALIA AND NEW ZEALAND. Theirs was the first textbook on Taxation, when in 1917 Butterworths published the FEDERAL INCOME TAX OF AUSTRALIA, which has now grown to international status, as GUNN'S COMMONWEALTH INCOME TAX LAW AND PRACTICE.

In 1917, when there was no regular form of publication of the Statutes or Rules, Butterworths began their "N.S.W. Statutes" and "N.S.W. Rules" series, which supplied subscribers with advance copies of Acts and Rules and a bound volume. These series, three years later, were merged with the official statutes and rules, and were the forerunner of the present method of distribution of Acts and Rules, not only in New South Wales, but in other States as well.

In New Zealand, Butterworths pioneered the first REPRINT OF STATUTES for that country. The benefits of such a complete set of statutes were soon recognized, and they were thus copied in some of the Australian States, including Queensland and Tasmania, being produced and published by Butterworths.

From the beginning, textbooks for the Australian Legal Profession by Australian authors have been fostered and published by Butterworths, and many of their authors today occupy positions of eminence in their profession or on the Bench. The culmination of Australian publication is, no doubt, the replacement of the English ENCYCLOPAEDIA OF FORMS AND PRECEDENTS with the AUSTRALIAN ENCYCLOPAEDIA OF FORMS AND PRECEDENTS, which is practically complete, and this, under the editorship of L. A. Harris and over sixty members of the profession throughout all States of Australia, who edited and revised the work.

In 1919, the publication of the VICTORIAN LAW REPORTS was taken over by Butterworths (now the VICTORIAN REPORTS), and they have become well known, not only in this country, but overseas, for their high standard of reporting. In 1960, the ARGUS LAW REPORTS were transformed over their Imprint. In that year also they were appointed Publishers of the WESTERN AUSTRALIAN REPORTS, and began their new and independent series of Reports for NEW SOUTH WALES.

The name of the firm carries its own warranty. "Butterworths"—a century and a half of tradition in law publishing: "Australia"—half a century of implementing that experience direct to the Profession in Australia.

A.H.

CURRENT LEGISLATION

NEW SOUTH WALES

Crown Lands (Amendment) Act 1960, No. 32.
Assent: 28 April 1960, amending the law relating to sale, leasing and reservation of Crown Lands, increased power of entry, and amending Crown Lands Consolidation Act 1913 and Closer Settlement (Amendment) Act 1907.

Hire Purchase Act 1960, No. 33, being an Act relating to the form and content of Hire Purchase Agreements, rights and duties of parties and repeal of Hire Purchase Agreements Act 1941 and other Acts, and to amend Credit Sale Agreements Act 1957 and Police Offences Act 1901. Assent: 28 April 1960. Operation: 1 August 1960.

Interstate Destitute Persons Relief (Amendment) Act 1960, No. 34.
Assent: 28 April 1960; operation on proclamation.

National Trust of Australia (New South Wales) Act 1960, No. 10.
Assent: 25 March 1960, dissolving and incorporating the body previously registered under the Companies Act.

THE CONFERENCE AT SALZBURG

The eighth Conference of the International Bar Association was held in Salzburg, Austria, from 4-8 July, 1960. The working sessions took place in the halls of the Europahaus (Kongresshaus) and simultaneous translation was made available in the four official languages, English, French, German and Spanish.

After the formal opening the following subjects were discussed:—

1. The function of a Bar Association in providing services to the profession.
2. Professional conduct.
3. Taking evidence and serving documents abroad.
4. Sovereign immunity.
5. The formation and operation of foreign subsidiaries and branches.
6. Atomic energy.
7. Court and court procedure for protection of investments abroad.
8. Monopolies and restrictive trade practices.

Representatives of a number of different countries were present and the Australian delegation amounted to one hundred members, exceeded in numbers only by the United States of America.

Trips to places of interest in the district were arranged for the delegates and their friends, and the delegates and their friends were entertained at various functions on a number of occasions.

L.A.H.

CASE NOTE

Frustration of Contract

C.I.F. contracts for sale of goods—customary route unavailable—performance by alternative route possible—whether contract frustrated.—Two contracts were entered into for the sale of groundnuts for shipment cost, insurance, freight from Port Sudan, shipment to be made in October-November, 1956 and November, 1956, respectively. The Suez Canal, the usual route for such shipments, having been blocked to shipping from 2 November, 1956 onwards till April, 1957, the sellers relied on this event as sufficient justification for non-performance and did not ship the goods. In both cases it was established that the goods could have been shipped via The Cape of Good Hope, though at a greater expense, this having been the shortest practicable route while the Suez Canal was closed. There was an

express exemption in the contracts from performance in the event of blockade or war, epidemic or strike, prohibition of import or export, and all cases of *force majeure*, preventing shipment.

The Court of Appeal held that the contracts had not been frustrated and shipment by the alternative route via The Cape would have been sufficient performance under the contracts and should have been arranged by the sellers. There was no express provision in the contracts that shipment was to have been via Suez nor could such a term be implied. While at the time the contracts were entered into the usual and customary route was through the Suez Canal, as this route was not available at the time for performance, the sellers' duty was to ship the goods by the alternative route via The Cape, which was the most practicable and best route available at the relevant time. SELLERS and ORMEROD, L.JJ., approved the opinion (on this point) of MCNAIR, J., in *Carapanayoti & Co., Ltd.* v. *E. T. Green, Ltd.*, [1958] 3 All E.R. 115 at p. 119, that where a contract provided, either expressly or by necessary implication, for performance to be carried out in a customary manner then it must be made in a manner which is customary at the time when the performance is called for.

Their Lordships declared that though the journey by The Cape route would be longer than via Suez and the cost of freight would be increased, these factors were not by themselves sufficient to render performance radically different from that undertaken in the contracts. The change in the performance of the contracts by the sellers arising from the changed circumstances was not so fundamental that it could be said that had the parties been aware of and considered the situation at the time of making the contracts then they would have said with one voice that in those circumstances their bargain was at an end. Furthermore, neither war nor *force majeure* prevented the goods from being shipped, for, although hostilities took place in the area of shipment at the material time, there had been no finding of war and nothing to prevent the goods from being put on board ship at Port Sudan for a voyage around The Cape to their contractual destinations. Thus the vendors were also precluded from relying on the express exemption from liability in the contracts. Test of LORD RADCLIFFE in *Davis Contractors, Ltd.* v. *Fareham U.D.C.*, [1956] A.C. 696 at p. 729 applied. *Carapanayoti & Co., Ltd.* v. *E. T. Green, Ltd.*, [1958] 3 All E.R. 115 overruled (*Tsakiroglou & Co., Ltd.* v. *Noblee & Thorle G.m.b.H.*, *Albert D. Gaon & Co.* v. *Société Interprofessionelle des Oléagineux Fluides Alimentaires*, [1960] 2 All E.R. 160).

THE INDUSTRIAL ARBITRATION (AMENDMENT) ACT 1959

by

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PART III

(5) PREFERENCE TO UNIONISTS

One of the most contentious issues raised by the new Act was the provision for "absolute preference". Before discussing it, however, it might not be out of place to say a few words about "preference" in general. Preference to unionists ranks amongst the earliest goals of the Australian trade union movement. This claim has been given varying degrees of legal recognition by the Australasian industrial jurisdictions, from compulsory unionism in New Zealand to prohibition of any preference clause in a Wages Board Determination in Victoria. But the real importance of preference lies, not in its recognition by industrial awards, but in the degree to which it operates as a fact. It is generally true to say that union membership is virtually compulsory in the heavy manufacturing and mining industries; this is recognized, often endorsed, by the employers concerned. Exemptions on the grounds of religious or other conscientious beliefs have little significance in this sphere. Moreover, the unions concerned do not rely upon any legal sanctions to enforce 100 per cent membership—unionism exists, not because of, but in spite of the law. Legal preference is thus only important in the less-organized, less militant occupations, such as clerical workers and shop assistants. The unions here are handicapped in their search for members by various factors—the middle class outlook of the white collar worker, his apathy, even distrust, of the union and the Labour Party, and so on. If this type of employee is to be brought within the union it must generally be by the external pressure of the law. Strange as it may seem, the unions concerned may receive somewhat faint-hearted support from other employee organizations representing predominantly the manual worker. This is so because their interests here are basically diverse. The latter type of union has no problem with union membership and it may not have very much in common, either politically or industrially, with "white collar" groups. Increase very greatly, by sanction of law, the members of a "white collar" union and you have something of a potential threat to the supremacy of those bodies representing the manual worker.

The history of preference to unionists in the Industrial Arbitration Act (N.S.W.) dates back to the original legislation of 1901. In the ensuing 59 years the extent and nature of the power has undergone many changes, including preference "other things being equal", unqualified preference and "absolute" preference. Prior to 1953, the source of the power was to be found in clauses (c) and (d) of the definition of "industrial matters",[94] while its actual content and the manner of its exercise was regulated by s. 20 (1) (g), (2), (4) of the Principal Act, as amended in 1951. Briefly, those sections enabled the Conciliation Committees to prescribe preference of employment to members of industrial unions specified in an award. Conscientious objectors, on religious grounds, could gain exemption from the preference clause on payment of an amount equivalent to the union subscription into Consolidated Revenue.[95] This power was, by virtue of ss. 30, 31, exercisable, at first instance, by the Industrial Commission, which, of course, could also deal with it on appeals from the Committees.

The effective operation of the 1951 provision was shortlived, however, for in 1953 it was overshadowed by the so-called "compulsory unionism" provisions incorporated in a new s. 129B. This provision required employers, bound by State awards or industrial agreements, to give absolute preference in employment to members of an approved industrial union or unions. No employer was to employ or continue in employment a person covered by this provision unless he was a financial member of the appropriate union or had applied to join such a body. Likewise, a duty was cast on the employee to become a union member or discontinue his employment. Failure to comply with these requirements rendered both employers and employees liable to a penalty. The "compulsory unionism" provisions applied to all adult workers,[96] covered by State awards or agreements, but certain classes of employees were exempted, e.g., students on vacation employment, persons in managerial positions. Moreover, conscientious objectors,

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[94] Section 5 (Principal Act), Clause (b) includes "The mode, terms and conditions of employment", and Clause (c) "The employment of . . . any persons or class of persons in any industry, or the right to dismiss or refuse to employ . . . any particular person or class of persons, but not so as to give preference in employment to members of industrial unions, except in accordance with the provisions of" s. 20(1)(g).

[95] The nature of the 1951 provision was discussed by the Industrial Commission in *Re Storemen and Packers', Etc., Awards* 1951 A.R. 527.

[96] I.e., over 18 years of age or a person (whatever his age) receiving adult rates.

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whether or not their beliefs were based on religious grounds, could be exempted on payment of an amount, equivalent to the union subscription, into Consolidated Revenue.[97] Safeguards were also provided to ensure that employees would not be unjustly refused admittance to a union or wrongfully expelled from it. The compulsory unionism provisions turned out to be a nine-days wonder, however, for soon after they came into operation, their validity was challenged in the High Court. But this issue was not pressed and the case was still pending some six years later. In the meantime no attempt was made to enforce the 1953 provisions.

The 1959 amendments repeal the old s. 129B and insert a new provision in its place[98] which, in some respects, is narrower, in others, wider than its predecessor. Under the new law, the Commission, the Committees, and the Apprenticeship Councils shall, on application, provide in an award or industrial agreement:

> "for absolute preference of employment to the members of the industrial union or unions specified in the award or industrial agreement. Such preference . . . shall be limited to the point where such a member and a person who is not such a member are offering for service or employment at the same time or, in the case of retrenchment, to the point where either such a member or a person who is not such a member is to be dismissed from service or employment".[99]

Consequential changes are made in s. 20 to co-relate it to this new provision. Conscientious objectors may obtain exemption on the same grounds as those specified in the old s. 129B, while exemptions previously granted under that section or under s. 20 (2) (of the 1940-1958 Act) continue to be effective. The new provision also retains the general principle of preference to ex-servicemen.

Before discussing the nature of "absolute preference", some other differences between the new s. 129B and its predecessor may be noted. The new provision applies to all employees (covered by State awards or agreements) whether adult or not. Apart from the general exemption provisions, referred to above, no special classes of employees, such as students, persons in managerial positions, are exempted from the operation of the new law. No

[97] For a discussion of the grounds on which exemption certificates should be granted, see *Re Appeals from Decision of Industrial Registrar, Etc.*, 1954 A.R. 71.

[98] By s. 12 (1959 Act).

[99] Section 129B(1)(a) (Principal Act) as amended.

positive duty is cast on the employer to dismiss a non-unionist employee, or on such an employee to join an industrial union. At the same time, the provisions safeguarding employees from being unjustly refused admittance to an industrial union or from being unlawfully expelled from such a body, do not appear in the new s. 129B—this will be discussed later.

Already some applications have been made to have "absolute preference" clauses inserted in awards and this has been done in a number of cases. The form of the standard clause adopted virtually lifts the relevant wording from the Act[100] which, of course, merely begs the question as to what "absolute preference" entails. Almost certainly the matter will come up for decision soon, but in the meantime it may be permissible to venture a few suggestions.

Interestingly enough, the Industrial Arbitration Act provided for "absolute preference" for a short period between 1926 and 1927,[101] and the meaning of those terms was considered in several cases. The most important was *Re Bank Officers (State) Conciliation Committee*,[102] where a Full Bench of the Industrial Commission[103] upheld a preference clause which, *inter alia*, required employers to dismiss non-unionists from employment and imposed a duty on non-unionist employees to join the appropriate union within a month. This was clearly compulsory unionism, but the Commissioner[104] thought it fell within the concept of absolute preference.[105] "Employment" in clauses (b) and (c) of the definition of "industrial matters" referred, not only to engagement but also to continuance in employment.[106] As far as "absolute" was concerned, the Commissioner thought its meaning was simple; it meant "free from impediments now or hereafter arising".[107] This has a sinister ring about it reminiscent of s. 92 of the Constitution!

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[100] See Standard Clause as inserted in *Storemen & Packers (Newcastle) Award* dated 2 May, 1960.

[101] Section 24C (1912-1926 Act) inserted by Amending Act (1926), but repealed by Amending Act (1927).

[102] 1926 A.R. 364.

[103] I.e., the Commissioner and four representatives each of employers and employees. Nowadays the Commission does not sit with lay members. See pp. 134-136 *supra*.

[104] Mr. Piddington.

[105] 1926 A.R. at p. 370.

[106] 1926 A.R. at p. 374. Cf. *Re Storemen & Packers, Etc., (State) Award* 1926 A.R. 194 at p. 200, *per* Deputy Commissioner.

[107] 1926 A.R. at p. 375.

It is very doubtful whether the above statements are still good law, even in relation to "absolute" preference. In the *Storemen and Packers' Case* (1951),[108] the Industrial Commission was very critical of the *Bank Officers' Case*. It had to consider the new preference clause, inserted in that year,[109] and, in particular, the unions' claims that the "industrial matters" provision coupled with the new preference section (s. 20 (1) (g)) empowered the Commission to award compulsory unionism. The Commission thought otherwise, however, holding that preference could refer only to engagement or retrenchment and not to continuity of employment. Preference, moreover, could only be understood in relation to the coexistence of a unionist and non-unionist offering their services for employment at the same time, or being liable to have their services terminated at the same time. Compulsory unionism was a negation of this idea. What is more, whatever the scope of the source of power in the "industrial matters" provision, this was subject to the controlling section, i.e., s. 20 (1) (g). In its interpretation of "preference", the Commission was obviously influenced by *R.* v. *Wallis; ex parte Employers' Association of Wool Selling Brokers*[110] and *R.* v. *Findlay; ex parte Victorian Chamber of Manufacturers*,[111] two cases in which the High Court considered the extent of the preference powers in the Commonwealth Act and where it rejected the claim that preference would support compulsory unionism.

Admittedly the *Storemen and Packers' Case* (1951)[112] concerned "ordinary" preference, but, it is submitted, that the basic propositions stated there are equally relevant in the case of absolute preference. The key term, in the 1959 amendments, is "preference", not "absolute", for although "absolute" may prevent conditions or limitations being imposed on a grant of preference, it cannot change the basic character of preference into something entirely different, i.e., compulsory unionism. Preference is, *ex necessitate*, limited to the time of engagement and to the time of retrenchment; it does not relate to the whole span of employment. But even if this were not so—even if "absolute" did extend the scope of preference beyond engagement and retrenchment—the new s. 129B imposes,

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[108] In *Re Storemen and Packers, Etc., Awards* 1951 A.R. 527.

[109] See note [95] *supra*.

[110] (1949), 78 C.L.R. 529.

[111] (1950), 81 C.L.R. 537.

[112] 1951 A.R. 527.

as we have seen, such a limitation. This limitation, moreover, has been included in the new standard preference clause.[113] It appears, then, that the new provision would not enable an award of compulsory unionism under the guise of "absolute" preference; in any case, this was the apparent intention of the Government.

But what of the term "absolute"? Clearly it is wider than a power to grant preference, "other things being equal".[114] But how does it differ from an unqualified power to award preference, i.e., without the qualifying adjective "absolute"? Only, it would appear in this respect; namely, that the tribunal cannot take into consideration matters other than membership or non-membership of an industrial union at the relevant time. It cannot, for instance, qualify the preference grant by length of service, additional qualifications or other factors. In the case of preference "other things being equal", the tribunals must take these other factors into account. In the case of the unqualified grant, it may do so. This seems to be the basic distinction between the various types of power. But even if the new power is as inflexible as might appear[115] the employer may, in particular cases, be able to avoid its strict application. He may, for instance, advertise a particular position which, to his knowledge, can be filled only by a non-unionist, because there is no unionist available who can do this type of work. It is hard to believe that he would, under the new s. 129B, be compelled to accept a unionist employee who could not do the work in question. Of course, this type of evasion, if it be such, could not be practiced on a large scale for in the majority of cases the services required are general, not specialized, e.g., shop assistant, clerk.

It will be recalled that the old s. 129B contained provisions protecting employees against industrial unions which unjustly refused admittance to the union or wrongfully expelled them from it. It will also be recalled that these safeguards have been omitted from the new provision. However, employees in these circumstances are not without remedies: in particular, s. 115 entitles persons "who are, by the nature of their occupation or employment, of the class of which a trade union is constituted, and who are not of general bad character . . . to be admitted to membership of the union, and to remain members thereof . . . so long as they shall comply with the rules of the union".

[113] See note [100] *supra.*

[114] E.g., as in s. 20(1)(g) (1940-1950 Act) and see: *Re Bridge and Wharf Carpenters (State) Award* 1944 A.R. 349 (350).

[115] This writer believes the Industrial Commission will ultimately define the preference power in more flexible terms.

This section also empowers the Commission to hear disputes as to the character of any applicant or the reasonableness of any admission fee, subscription, fine or levy or other requirements of trade union rules and to annul or alter such rules to bring them into conformity with what it declares to be reasonable in the circumstances.[116] This provision, it will be noted, applies to (registered) trade unions, but it will, of course, also apply automatically to all industrial unions of employees.[117] In addition, an expelled member may, in certain circumstances, avail himself of remedies in the ordinary courts, and obtain, *inter alia*, damages, as witness *Bonsor* v. *Musicians' Union*.[118]

Any general discussion of absolute preference to unionists or compulsory unionism is likely to end up in a series of charges and counter charges, depending on one's moral or political outlook. To one person they may represent an infringement of basic human "rights" — the Universal Declaration of Human Rights (U.N.) was frequently cited in support of this view when the Bill was before the House.[119] To another, however, they can be justified on the basis that non-unionist employees enjoy employment conditions secured for them by the actions of unions and their members and, therefore, they should share this responsibility. It is not intended, here, to canvass these or other like issues of principle as this is a matter for personal judgment. Three general matters call for brief comment, however. In the first place, the practical impact of preference to unionists is, as already suggested, rather limited. Secondly, the new s. 129B may achieve, in the long run, what its predecessor hoped to achieve overnight, that is, compulsory unionism, but this depends primarily on the attitude of the unions concerned. And, thirdly, absolute preference coupled with the new political contributions provision (s. 107 (1) (b)) may result in some increase in payments to the Australian Labour Party —whether this is desirable or not will generally depend on one's political affiliations.

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[116] Other statutory remedies which may be available are s. 107 (1) (b) and s. 111.

[117] I.e., because all industrial unions of employees must before registration, as such, have registered under the Trade Union Act. As to the meaning of s. 115, see *Thornton* v. *Federated Ironworkers' Assn. N.S.W. Branch* 1955 A.R. 122.

[118] [1956] A.C. 104; [1955] 3 All E.R. 518.

[119] E.g., Parliamentary Debates, 2409 (Mr. Wilson).

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